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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ROBERT FREEDMAN, Plaintiff and Appellant, v. LAVELY & SINGER, et al., Defendants and Respondents.	B186889 (Los Angeles County Super. Ct. No. SC084664)

APPEAL from a judgment of the Superior Court of Los Angeles County, Valerie Baker, Judge. Affirmed.

Thelen, Reid & Priest, James H. Turken, Nicole M. Duckett and Scott Pomerantz for Plaintiff and Appellant.

Lavely & Singer, Michael D. Holtz and William J. Briggs, II, for Defendants and Respondents.

INTRODUCTION

This appeal is taken from an order striking a complaint filed by Robert Freedman (Freedman) pursuant to the "anti-SLAPP" statute (Code Civ. Proc., § 425.16).[1]

The appeal necessitates review of two lawsuits. In the first lawsuit, Emmanuel Gordon (Gordon) sued Freedman for conversion and return of jewelry. Gordon had consigned his jewelry to a third party who then gave the jewels to Freedman as collateral for a loan. In that action, the trial court granted a pre-judgment writ of attachment in favor of Gordon. To partially satisfy that writ, counsel for each party negotiated a stipulation whereby Freedman returned some of the jewels to Gordon and Gordon promised to maintain the jewels during the pendency of the lawsuit. The trial court entered the stipulation as a formal order. Thereafter, in violation of the stipulation and order, Gordon transferred the jewels overseas.

In the second lawsuit, following discovery of Gordon's transfer of the jewels, Freedman sued Gordon's attorneys. This second lawsuit is the subject of the anti-SLAPP motion to strike. Although Freedman's complaint asserted various causes of action, it essentially alleged that Gordon's attorneys were responsible for Gordon's failure to maintain the jewels. Among other things, the complaint alleged that defendants had breached the implied warranty that as agents they had authority from their principal (Gordon) to enter into the stipulation. It further alleged that defendants (not Gordon) had breached the stipulation, had deceived him (Freedman) into agreeing to turn over the jewels, and had converted the jewels.

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[1] All undesignated statutory references are to the Code of Civil Procedure.

In granting the anti-SLAPP motion and striking Freedman's complaint, the trial court first found that all of the causes of action arose out of the defendant-lawyers' protected conduct: petitioning activity involving the stipulation and court order made after issuance of the writ of attachment in the first lawsuit. The trial court then held that Freedman had failed to meet his burden of showing that there was a reasonable probability he would prevail on the merits on any of his causes of action.

We conduct a de novo review of the trial court's order and affirm its order of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The First Lawsuit*

Gordon, doing business as Manny Gordon Trading, is a wholesale jewelry dealer. In October 1999, Gordon filed a lawsuit based upon the misappropriation of $6.8 million in jewelry he had consigned to Richard Maslan & Company, Inc. (Maslan). Gordon alleged that Maslan had converted the property to his own use by pledging it as collateral to various pawnbrokers and lenders.[2] Gordon sued Maslan as well as the pawnbrokers and lenders, including Freedman, who was alleged to have received from Maslan seven items valued at approximately $1,430,000 as collateral for a personal loan. In regard to the pawnbrokers and lenders, Gordon alleged causes of action for conversion and recovery of goods. Gordon sought return of the jewelry or, alternatively, monetary compensation.

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[2] In July 2002, a jury convicted Maslan of eight counts of grand theft by embezzlement based upon his misappropriation of Gordon's jewelry. The trial court sentenced him to state prison. In October 2003, Division Three of this court affirmed the conviction. (*People v. Maslan*; B163967.)

In September 2001, the trial court in the first lawsuit granted Gordon's motion for imposition of an issue sanction against Freedman. The court ruled, based upon the evidence presented, that it "shall be taken as established that [Freedman's loans to Maslan] were not in compliance with any of the requirements of the Finance Code and therefore Freedman has acquired no security interest in the jewelry superior to that of Gordon's."

In April 2002, the trial court granted Gordon's application for a pre-judgment right to attach property in the amount of $1,453,970 in Freedman's possession. To partially satisfy the writ of attachment and to accommodate Freedman's request that Gordon not attach all of his real property, the parties agreed that Freedman would turn over to Gordon the three items he still possessed: diamonds worth approximately $500,000. (Freedman had previously sold the other four items.) In the agreement (labeled a stipulation), Gordon agreed to "maintain those goods in his custody, possession, or control until a final judgment is entered in this litigation or the parties otherwise resolve this litigation." In particular, Gordon agreed that he would "maintain possession of and . . . not dispose of, sell, consign, or pledge" the three items during the pendency of his lawsuit. The stipulation was signed by counsel for each party. William Briggs, II, (Briggs) of the law firm of Lavely and Singer, signed on behalf of Gordon. On July 15, 2002, the trial court entered the stipulation as an order of the court.

In July 2002, Freedman and his attorney gave the three diamonds to Gordon's daughter at Briggs' office. Thereafter, Gordon, in violation of the

court's order, shipped the jewelry overseas.[3] As explained below, Gordon's transfer of the diamonds was not discovered until sometime after it had occurred.

In September 2004, the trial court dissolved the writ of attachment Gordon had obtained against Freedman and held that the attached property was released. The trial court's order was a response to the opinion filed in *South Beverly Wilshire Jewelry & Loan v. Superior Court* (2004) 121 Cal.App.4th 74 (*South Beverly*), a writ proceeding involving two other lender-defendants in Gordon's lawsuit. In *South Beverly*, the trial court, relying upon the court of appeal's affirmance of Maslan's conviction of grand theft by embezzlement (see fn. 2, *ante*), had granted Gordon's motion for summary adjudication on his causes of action for conversion and return of personal property against those two lenders. (*Id.* at p. 77.) The trial court relied upon the common law rule that a thief (Maslan) cannot pass title to stolen property (the jewelry) to third parties (the two lenders). Division Three of this court reversed the grant of summary adjudication. It found that Gordon's failure to file UCC-1 financing statements that would have put Maslan's creditors on notice of his (Gordon's) claim of title to the jewelry precluded reliance upon the common law rule. (*Id*. at pp. 77-78, 80-82.) The appellate court held that the applicable principle was, instead, the following one found in Civil Code section 3543: "Where one of two innocent persons [Gordon and the lender] must suffer by the act of a third [Maslan], he, by whose negligence

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3 The record is in conflict about the date of this shipment. For purposes of this appeal, there is no need to resolve that conflict. We merely note that the following was presented on that issue. An October 2004 trial brief prepared by Briggs (Gordon's attorney) stated the transfer occurred in September 2002. However, in an April 2005 declaration, Briggs averred that his statement in the earlier trial brief was a mistake and, that in late November or early December of 2004, Gordon had told him that he had shipped the diamonds overseas in June 2004. A declaration from Gordon also gave June 2004 as the date of transfer.

it happened, must be the sufferer [Gordon]." However, that analysis did not conclusively resolve the issue as between Gordon and the two lenders. The appellate court directed the trial court to conduct further proceedings, including a determination whether Maslan was generally known by his creditors "to be substantially engaged in selling goods that belong to others" (*id.* at p. 81) because a finding that Maslan was so known could defeat a creditor's claim that the creditor took without notice of Gordon's interest.

Following dissolution of the writ of attachment, Freedman contended that Gordon was required to return the three diamonds to him. The trial court agreed. After Gordon failed to return the property, the trial court conducted a hearing and determined that Gordon no longer had possession of the diamonds because he had shipped them overseas. (See fn. 3, *ante*.)

In December 2004, Freedman moved for terminating and contempt sanctions against Gordon based upon Gordon's disposal of the diamonds. The trial court imposed monetary sanctions equal to the value of the jewelry. In a writ proceeding initiated by Gordon, Division Three of this court overturned the trial court's order in a nonpublished opinion.[4] (*Gordon v. Superior Court (Freedman)* (April 25, 2005, B180554).)

In February 2006, Freedman and four other defendants moved to dismiss Gordon's action for failure to bring it to trial within five years. In April 2006, the trial court granted the motion and dismissed the entire action with prejudice.

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[4] The appellate court reasoned that the order was in excess of the trial court's jurisdiction because it had improperly determined "a portion of the substantive merits of [the] case . . . when there has not yet been a trial on the merits of the matter." In addition, the court found that the order could not be upheld as a contempt sanction because there is a statutory $1,000 limit on a contempt fine.

Gordon's appeal from that order of dismissal is pending in Division Three of this court. (*Gordon v. Maslan & Co. et al;* B190946.)

2. *The Present Lawsuit*

In February 2005 – while Gordon's lawsuit against Maslan and Freedman was still pending in the trial court – Freedman filed suit against Gordon's attorneys: the law firm of Lavely & Singer and William Briggs, II, the partner who had signed the July 2002 stipulation on Gordon's behalf (collectively defendants). The complaint alleged that defendants were responsible for Gordon *not* knowing about any restriction on his ability to transfer the three diamonds that Freedman had turned over to him. In specific, the complaint alleged that defendants "did not advise Gordon of the stipulation because it would have educated Gordon that the law firm merely obtained the diamonds by agreement and without the ability of Gordon to convert them to cash" and that defendants' "concealment of the agreement was designed to show Gordon that the law firm recovered the diamonds justifying their fees [in excess of $1 million] already billed and future fees that would be billed."[5]

Based upon those operative facts, Freedman's complaint alleged six causes of action.

The first was for an agent's breach of the implied warranty of authority. It alleged that defendants did not have authority from Gordon to enter into the stipulation.

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[5] The complaint alleged that since execution of the stipulation, defendants had billed in excess of $1 million.

The second was for breach of contract. It alleged that defendants "breached said agreement by failing to ensure that Gordon maintained possession of the jewels as specified in the agreement."

The third was for conversion. It alleged that defendants "failed to ensure that the jewels were . . . maintained according to the stipulation . . . by Gordon and failed to marshal and control the jewels in order to prevent Gordon from disposing of [them]. Further, Defendants failed to advise Gordon that the jewels were the subject of a stipulation and Court Order and that disposing of the jewels would violate said stipulation and Court Order. [¶] Defendants have converted the jewels belonging to Freedman for their own benefit by failing to ensure that the jewels were properly maintained and they failed to render said jewels to Freedman upon dissolution of the Writ [of Attachment]."

The fourth was for unjust enrichment. It alleged that as a result of the events, defendants had been "unjustly enriched to Freedman's prejudice and detriment" and therefore "should be adjudged trustee for Freedman and should be required to account for and be deemed holding in trust for [him] . . . the money value of the jewels which have been converted and misappropriated by them."

The fifth and sixth were for fraud in the inducement and fraudulent misrepresentation. Each of those causes of action alleged that defendants represented to Freedman that the diamonds "would be maintained and would not be disposed of" but those "representations were false. In truth and in fact, Defendants never intended for said jewelry to be maintained and in fact neglected to advise Gordon of the stipulation and/or the Court Order. [¶] At the time Defendants made said representations they knew they were false." Freedman further alleged that if he had known those representations were false, he would not have signed the stipulation and turned over the jewels to Gordon.

The complaint sought compensatory damages (value of the three diamonds plus interest) and punitive damages.

3. *Defendants' Anti-SLAPP Motion*

Defendants filed a timely motion pursuant to the anti-SLAPP statute to strike Freedman's complaint.

To explain the genesis of the July 2002 stipulation, defendants offered declarations from Gordon and Briggs. Gordon averred that after he had obtained the writ of attachment, Freedman's attorney told Briggs that Freedman would turn over the three diamonds still in his possession to avoid imposition of a lien on all of Freedman's real property. Briggs informed Gordon of the offer. Gordon "specifically authorized Mr. Briggs to enter into an agreement with [Freedman's attorney] for a turnover" of the jewelry but left the details of the transfer to Briggs. Gordon never received a copy of the stipulation or the court order from Briggs and was never informed by Briggs of its terms, including the restriction on any transfer of the jewelry. Gordon explained that Briggs never forwarded copies to him because prior thereto, he had instructed Briggs "to stop sending paper work to me . . . unless it required my signature."[6]

Briggs' declaration corroborated Gordon's explanation of the events. Gordon had expressly authorized him to enter into an agreement for the return of the diamonds but left the details to him (Briggs). Briggs explained:

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6 Gordon's declaration elaborated: "I have been involved in this case since October 1999 and have accumulated mountains of paperwork sent to me by Mr. Briggs. In fact, the amount of paperwork generated by this case took up too much space in my small office. I simply did not want to receive anymore of the legal briefs, letters, and miscellaneous paperwork because it was becoming too much." "I told [Briggs] it was making me sick to look at all of the paperwork since it reminded me of what Richard Maslan had done to me."

> "The fact that Mr. Gordon was not required to sign the stipulation and order is one of the reasons that I did not advise him that [counsel for Freedman] and I had entered into the stipulation and order. Moreover, at all times I understood that the stipulation and order was designed to achieve Mr. Gordon's objective in his litigation, which was to secure a return of his property and to secure Mr. Gordon's recovery on his claims against Freedman. Further, *I did not send the stipulation and order to Mr. Gordon because of prior instructions from him not to send him anymore paperwork in the litigation unless it required his signature.* Mr. Gordon had told me sometime in 2001 or 2002 that he had too little room for all of the paperwork generated by his case, and that he got sick when he had to look at all of the paperwork. And, *I did not discuss the contents of stipulation and order with him since he left the details to me*. It has always been my impression and understanding that Mr. Gordon was not overly interested in the fine legal details, and in this instance he was merely interested in securing the return of what he believed to be his property and to secure a lien against real property owned by Freedman in order to satisfy a judgment. How I accomplished that for Mr. Gordon and the details of accomplishing these tasks for him were not discussed with him. *Yet, at all times, I understood that I had the express approval of Mr. Gordon to enter into an agreement with [Freedman's attorney] for the return of those goods.* Additionally, Mr. Gordon never asked me about the terms of the agreement that I reached with [Freedman's attorney]. It was my understanding that Mr. Gordon was only interested in when he would receive his diamonds and jewelry and how the physical transfer of the diamond and jewelry would take place." (Italics added.)

Briggs also explained he did not discuss the stipulation and order or any of their terms with Gordon's daughter when the diamonds were turned over to her. Briggs first learned that Gordon had shipped the diamonds overseas after the trial court dissolved the writ of attachment in September 2004.

4. *Freedman's Opposition to the Anti-SLAPP Motion*

Freedman's opposition to the motion to strike his complaint first contended that defendants' actions did not arise out protected activity because the "Legislature never intended to protect activities of attorneys who aid and abet the spoliation of evidence and who willfully and fraudulently induce a party to enter into a stipulated court order that the attorneys know would not be honored by their own client."

In regard to the question whether he could establish a substantial probability of prevailing upon the merits of his causes of action, Freedman offered primarily argument, not evidence. Citing the *South Beverly* decision and the trial court's subsequent dissolution of the writ of attachment issued against Freedman, he stated that "the only issue left for determination by this Court is whether Gordon can establish that Maslan was generally known by his creditors to be substantially engaged in the sale of goods belonging to others. The Court of Appeal decision in this case is self-explanatory. Only by proving an exception to the Uniform Commercial Code can Gordon prevail. Gordon must establish that Maslan's creditors generally knew that he dealt in consigned [goods]. That burden is near impossible as not one of Maslan's creditors is a witness in the underlying action."

As evidence, Freedman offered declarations, deposition testimony and trial briefs from Gordon's lawsuit against Maslan and Freedman that set forth the history of the July 2002 stipulation and the subsequent discovery of Gordon's transfer of the diamonds. (See fn. 3, *ante*.)

5. *The Trial Court's Ruling*

In a detailed five-page ruling, the trial court found that all of Freedman's causes of action arose out of protected activity and that Freedman failed to establish a reasonable probability of success on the merits on any cause of action.

In addition, the court found the anti-SLAPP motion should be granted on the ground that the court "lacked subject matter [jurisdiction] over the claims in [Freedman's] Complaint because [he] had not yet been determined the owner of the diamonds and jewelry at issue in the Underlying Action, and therefore [he] had no present rights in the goods that were the subject of the Stipulation and Order on the Writ of Attachment in the Underlying Action, which formed the basis for each of the causes of action in the Complaint in this action." The trial court struck Freedman's complaint and awarded defendants attorney fees and costs.

DISCUSSION

"On appeal from an order granting or denying a motion pursuant to section 425.16, the appellate court engages in a two-step process, determining, first, whether the defendant made a threshold showing that the challenged cause of action is one arising out of acts done in furtherance of the defendant's exercise of a right to petition or free speech under the United States or California Constitution in connection with a public issue, as defined in the statute; and second, whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citations.] [¶] We independently determine whether a cause of action is based upon activity protected by the statute, and if so, whether the plaintiff has established a reasonable probability of prevailing. [Citation.] In doing so, we consider 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' [Citations.]" (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1056-1057.)

A. *Arising From Protected Activity*

Section 425.16 provides, inter alia, that "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or

free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a . . . judicial proceeding[;] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body. . . ." (*Id.* subd. (e).)

In deciding whether a plaintiff's lawsuit comes within the purview of the anti-SLAPP statute, the focus is not on the form of the plaintiff's cause of action but rather on the defendant's activity that gave rise to its asserted liability. "[T]he critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity. [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) In *Navellier,* the Supreme Court reiterated its earlier holdings which had "declined to hold 'that section 425.16 does not apply to events that transpire between private individuals' [citation] and [had] explicitly rejected the assertion '"that the only activities qualifying for statutory protection are those which meet the lofty standard of pertaining to the heart of self-government"' [citations]." (*Id*. at p. 91.)

The facts and holding in *Navellier* are instructive on the question whether Freedman's lawsuit arises from actions by the defendants which are protected by the anti-SLAPP statute. In *Navellier*, the plaintiffs filed an action for breach of contract and fraud that alleged the defendant first had committed fraud in misrepresenting his intent to be bound by a release executed in a federal action and later had breached that release by filing counterclaims in the federal action. (*Id*. at p. 87.) The Supreme Court held that the plaintiffs' allegations fell "squarely within

the plain language of the anti-SLAPP statute." (*Id*. at p. 90.) The fraud claim complained about defendant's negotiation, execution and repudiation of the release. (*Ibid*.) The court concluded that to the extent the fraud claim arose from defendant's negotiation and execution of the release (including his misrepresentation that he intended to perform the release), the claim was "based on a statement or writing made in connection with issues under consideration or review by a judicial body—i.e., the issues under consideration in [the plaintiffs'] federal action. . . . Such statements and writings are expressly protected by the anti-SLAPP statute. (§ 425.16, subd. (e)(2).)" (*Id*. at pp. 90-91, fn. 6.) The court also found that the breach of contract claim arose from protected activity because it "expressly refers to activity protected under the anti-SLAPP statute: [the defendant's] negotiation and signing of the release and his pleading of counterclaims in the federal action." (*Ibid.*) "A claim for relief filed in federal district court indisputably is a 'statement or writing made before a . . . judicial proceeding' (§ 425.16, subd. (e)(1))." (*Id*. at p. 90.)

By a parity of reasoning, we find that Freedman's lawsuit arises from defendants' constitutionally protected activity. Each of the causes of action arises from the trial court's July 2002 order that Freedman turn over the jewelry to Gordon. That order grew out of an agreement that the parties reached after the court had issued a writ of attachment in favor of Gordon to facilitate Gordon's ability to collect any judgment he would obtain against Freedman. (See, e.g., 6 Witkin, Cal. Procedure (4th ed. 1997) Provisional Remedies, § 45, pp. 55-56.) Freedman had sought the agreement to avoid Gordon attaching all of his real property. In the present lawsuit, Freedman alleges that defendants did not have the authority to enter into the stipulation; that defendants breached the stipulation; that defendants converted the property covered by the stipulation; that defendants misrepresented that Gordon would abide by the stipulation's prohibition on any

transfer of the jewels; and that defendants had been unjustly enriched because the court's order had been violated. It is therefore clear that all of Freedman's claims arise from statements and conduct made in connection with an issue under consideration or review by a judicial body: issuance and enforcement of a writ of attachment in favor of Gordon.

Freedman's contrary argument is not persuasive. Focusing on the allegations in his complaint that defendants failed to inform Gordon about either the existence of the trial court's order or its specific terms, Freedman argues that defendants' conduct "[i]n no way could . . . have been *in furtherance* of Gordon's right to petition." This argument fails for two reasons.

First, it is based on a misreading of *Navellier*. Freedman claims that *Navellier's* conclusion that the defendant's activities were covered by the anti-SLAPP statute was based solely on the fact that the defendant filed counterclaims in the federal action. The court's holding was not so limited. As explained in our earlier discussion of that case, *Navellier* noted that the plaintiffs' claims were based upon the defendant's negotiation of the release and his undisclosed fraudulent intent not to abide by its terms, a fraud that only became clear when he subsequently filed his counterclaims and therefore breached the agreement contained in the release. *Navellier* held that *all* of these activities were protected within the meaning of the anti-SLAPP statute. (*Navellier, supra,* 29 Cal.4th at p. 90, fn. 6.) Just as the *Navellier* defendant's actions in negotiating and repudiating the release were part of the petitioning process, so too are defendants' actions prior to and after the execution of the July 2002 stipulation. This includes both the claim that defendants deceived Freedman during the initial negotiation of the stipulation and the claim that they thereafter improperly failed to inform Gordon of the order. All are part and parcel of the petitioning process because they occurred

in the context of attempting to satisfy a writ of attachment issued by the court to secure Gordon's ability to enforce a judgment against Freedman.

The second reason the argument fails is that Freedman is inappropriately parsing the allegations of his complaint by now urging that the gist of his claim is defendants' conduct after the stipulation was entered, e.g., their failure to inform Gordon of its terms. Putting aside the philosophical question whether nonfeasance can properly be characterized as conduct, the real point is that this part of Freedman's claim is inextricably bound up with the allegations that *from the outset* defendants misrepresented Gordon's intent to perform because they had no authority from him to enter into the agreement and never intended to inform him of the stipulation's restriction on transfer of the diamonds. As explained above, defendants' representations made during the negotiation of the stipulation are protected activity. It therefore follows that their inaction following the execution of the stipulation—inaction that flows from and is consistent with Freedman's other claims against defendants—is likewise protected.

In sum, we agree with the trial court's conclusion: "[T]he Complaint and all of the causes of action alleged by [Freedman] arose out of petitioning activity under CCP § 425.16 because all of the causes of action arose from a statement or writing made in connection with an issue under consideration or review by a judicial body, and involved conduct aimed at advancing self-government (i.e., parties contracting with each other to govern their respective course of conduct). . . . [T]he specific petitioning activity at issue in this case involved a written Stipulation and Court Order made in connection with a Writ of Attachment that was under consideration by the Court in the case of Gordon v. Maslan, et al."

B. *Probability of Prevailing*

Once it is determined that a defendant's actions arise out of the right to petition, the burden then shifts to the plaintiff to establish a probability of prevailing on its claim. The plaintiff must make a prima facie showing of facts that would, if proved, support a judgment in its favor. A plaintiff cannot rely on the allegations in the complaint, but, instead, must provide the trial court with sufficient evidence to permit the court to determine whether there is a probability the plaintiff will prevail. In making its determination, the trial court can also consider the evidence offered by the defense to determine whether it defeats the plaintiff's case as a matter of law. (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398, and cases cited therein.) The trial court must "grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) As noted earlier, we conduct a de novo review of the trial court's decision. (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768.)

Freedman's first cause of action alleges that defendants breached the implied warranty that they had authority from Gordon to enter into the stipulation. (Civ. Code, § 2342; *Tri-Delta Engineering, Inc. v. Insurance Co. of North America* (1978) 80 Cal.App.3d 752, 760.) Freedman offered no evidence to support that claim for relief. Defendants, on the other hand, offered declarations from Gordon and Briggs to establish that Gordon had specifically authorized them to enter into the stipulation. Based upon this record, Freedman failed to discharge his burden of establishing a probability that he would prevail upon that claim.

Freedman attempts to avoid the force of this conclusion in the following manner. Relying upon the evidence that defendants never informed Gordon of the stipulation's restriction on transfer of the diamonds, he argues: "If Gordon was not

even aware of his principal obligations under the Stipulation, the logical conclusion is that he could not have given authority for its execution." Not so. The declarations from Gordon and Briggs explained that defendants were expressly authorized to enter into the stipulation but that Gordon left the details of the transfer to Briggs. Furthermore, the declarations explained that Gordon instructed Briggs not to send him a copy of the agreement or otherwise advise him of its specific provisions. Freedman's failure to offer any evidence to contradict that showing compels rejection of his argument.

Freedman's cause of action for breach of contract seeks to impose *contractual* liability upon defendants because Gordon breached the July 2002 stipulation when he transferred the diamonds overseas. Neither the law nor the facts support this theory. If an agent, acting within the scope of authority, enters into an agreement on behalf of a disclosed principal, the principal, not the agent, is liable for breach of that agreement. (*Filippo Industries, Inc. v. Sun Ins. Co.* (1999) 74 Cal.App.4th 1429, 1442.) Here, the evidence established Gordon authorized defendants to enter into the stipulation. Briggs signed the stipulation on behalf of Gordon, thereby disclosing the agency relationship. Furthermore, defendants never assumed any obligation in their own name. On this uncontradicted record, Freedman has failed to establish a probability of prevailing upon his breach of contract claim. Freedman's reliance upon the principle that an agent can be liable for breach of contract if the agent acted *without* a good faith belief that he had authority to bind his principal[7] is misplaced. All the evidence supports the

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[7] Civil Code section 2343 provides, in pertinent part: "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency[:] [¶] . . . [¶] 2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so."

conclusion that defendants had a good faith belief that Gordon had authorized them to execute the stipulation.

Freedman's cause of action for conversion also fails for want of evidence. To prevail upon a claim of conversion, a plaintiff must show, *inter alia*, that he owns or has the right to possess the property allegedly converted by the defendant. (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.) Here, Freedman failed to present any evidence to the trial court that he either owned or had the right to possess the diamonds. When the anti-SLAPP motion was litigated, Gordon's lawsuit against Maslan and Freedman was still pending and one of the issues that had yet to be determined in that action was who had the right to the diamonds. In particular, the *South Beverly* court had held that in order to resolve the competing claims to the diamonds, the trial court needed to determine whether Maslan was generally known to his creditors as an individual who substantially sold jewelry belonging to others.[8] Hence, at the time of the anti-SLAPP motion, Freedman could not assert a claim in the diamonds superior to others.

In his reply brief, Freedman argues for the first time that his right to possession of the diamonds was established by the trial court's September 2004 order directing Gordon to return the jewels to him. Issues raised for the first time in a reply brief are not to be considered. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) In any event, the argument fails on its merits. Freedman reads too much into the September 2004 order. As explained earlier, the trial court made that order after, in response to the *South Beverly* opinion, it had dissolved the writ of attachment issued earlier in favor of Gordon. Contrary to what Freedman suggests, the September 2004 order cannot be read as a finding that his claim to the

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[8] As our earlier discussion of *South Beverly* makes clear, that court did not hold, as Freedman now claims, that he "had a superior security interest in the jewelry[.]"

diamonds was superior to that of others given that *South Beverly* had directed the trial court to conduct further proceedings before resolving the competing claims to the jewelry at issue in the writ proceeding. In sum, the trial court in the instant case properly concluded that the conversion action "could not be sustained because there was insufficient evidence to establish that [Freedman] owns or has legal title to the jewelry and diamonds[.]"

As for the two fraud causes of action, Freedman's opposition to the anti-SLAPP motion presented *no* evidence about what defendants said during the negotiations or execution of the stipulation to support his claim that they had intentionally deceived him. To avoid that evidentiary failure, Freedman argues that defendants "implicitly represented to [him] and to the Court that, as Gordon's counsel, it would inform Gordon of his obligations pursuant to the Stipulation and Order." Relying upon the evidence that Briggs never told Gordon about the stipulation or its terms, Freedman also argues that defendants "committed fraud by making promises it knew its principal would not fulfill[.]"[9]

Freedman's arguments are not persuasive. The litigation privilege found in Civil Code section 47, subdivision (a) bars use of any evidence about the negotiation or execution of the stipulation to establish the fraud claims.[10] This statutory privilege "immunizes litigants from liability for torts, other than malicious prosecution, which arise from communications in judicial proceedings. [Citation.] The privilege generally applies to any communication by a litigant in a judicial proceeding that is made 'to achieve the objects of the litigation' and has 'some connection or logical relation to the action.' [Citation.] The primary

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9 Freedman made the same argument in his opposition to the anti-SLAPP motion.

10 Civil Code section 47 provides, in pertinent part: "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . (2) judicial proceeding."

purpose of the privilege is to afford litigants 'the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.' [Citation.]" (*Navellier v. Sletten, supra,* 106 Cal.App.4th at p. 770.) In this case, any representations (express or implied) defendants made during the negotiation and execution of the stipulation fall within the ambit of the litigation privilege because the representations were part of a judicial proceeding (Gordon's lawsuit against Maslan and Freedman) and were made to achieve an object of the litigation (partially satisfy the writ of attachment and secure Gordon's recovery against Freedman).

Freedman advances two arguments to defeat application of the litigation privilege to his fraud causes of action.

First, he claims that the gravamen of his fraud claim is not what was said during the negotiations leading to the execution of the stipulation but, instead, is defendants' subsequent "withholding knowledge of the Stipulation and the Order from Gordon." Freedman argues that the latter cannot constitute communicative acts within the meaning of the privilege. This argument is nothing more than an improper effort to sidestep the allegations in his complaint that defendants intentionally misrepresented that Gordon would not dispose of the diamonds and that defendants never intended for the jewels to be maintained. In any event, the claim that defendants withheld information from Gordon is merely the flipside of the complaint's allegations that defendants never intended for Gordon to keep the diamonds. Freedman's efforts to recast his fraud claims does not preclude application of the litigation privilege.

Second, Freedman urges that an exception to the litigation privilege applies: spoliation of evidence. He relies upon subdivision (b)(2) of Civil Code section 47.

It provides, in pertinent part: "This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section." This argument need not detain us. Freedman's opposition to defendants' anti-SLAPP motion failed to present *any* evidence to support the theory that defendants entered into the stipulation for the purpose of precluding use of the diamonds as evidence at trial.[11]

Lastly, Freedman's cause of action for unjust enrichment requires him to establish that defendants received a benefit at his expense and that it would be unjust for defendants to retain that benefit. (*First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662-1663.) Freedman, recognizing that he provided no evidence that defendants ever received any benefit or advantage from the execution of the stipulation, argues that he "does not need to make such a showing, however, as it is sufficient if Gordon was unjustly enriched. Under [Civil Code] Section 2343, [defendants are] responsible to [him] 'as a principal for [their] acts

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11 The trial court likewise rejected this argument. It explained: "[T]here was no evidentiary support for [Freedman's] argument that Defendants entered into the Stipulation (which resulted in the Court Order on the Writ of Attachment in the Underlying Action) with the intent to deprive [Freedman] of the use of any evidence at trial, or with the intent to aid and abet the spoliation of evidence, or with the intent to fraudulently induce [Freedman] to enter into a court order which Defendants knew would not be honored by their client[.]"

At another point in its order, the trial court wrote that Freedman "made an insufficient showing, even under the liberal standards governing how the Court considered [his] evidence on this [anti-SLAPP] Motion, that Defendants' conduct in any way came within the exceptions to the litigation privilege set forth in [Civil Code] § 47(b)(2)."

in the course of [their] agency' if [their] acts were 'wrongful in nature.'" He claims that defendants' actions were wrongful because they committed fraud. From that premise, he argues "in the unjust enrichment cause of action, [defendants] stand[] in Gordon's shoes as the principal. Gordon did receive a benefit—possession of the jewelry and the proceeds from its sale. Substituted in Gordon's place pursuant to Civil Code section 2343, [defendants were] unjustly enriched by [their] wrongful acts." The argument fails. As explained above, Freedman presented no evidence defendants committed fraud, the touchstone of his unjust enrichment argument. He therefore failed to establish a probability of prevailing upon his claim for unjust enrichment.

DISPOSITION

The order dismissing the complaint made pursuant to a special motion to strike under section 425.16 is affirmed. Respondents shall recover their attorney fees and costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J. SUZUKAWA, J.